PART VIII

STATUTORY PRESUMPTIONS IN MINERS' CLAIMS

C. SECTION 411(c)(4)

3. IMPLEMENTATION UNDER PART 410

To establish 15 years of qualifying surface coal mine employment, the miner must establish that the environmental conditions of the surface mine are "substantially similar to those in an underground mine." ***Luker v. Old Ben Coal Co.***, 2 BLR 1-304 (1979); *see also* ***Skewes v. Consolidation Coal Co.***, 6 BLR 1-834 (1984). The necessity of establishing comparability of conditions depends, however, on the type of mining operation involved rather than the location of a particular worker's job. ***Alexander v. Freeman United Coal Mining Co.***, 2 BLR 1-497, 1-504 (1979). An above-ground worker at an underground mine is *not*, therefore, required to show comparability of environmental conditions in order to take advantage of the presumption. ***Alexander v. Freeman United Coal Mining Co.***, 2 BLR 1-504 (1979).

While the Section 411(c)(4) presumption is invoked where "other evidence demonstrates" the existence of a totally disabling chronic respiratory or pulmonary impairment, *see* ***Phillips v. Mathews***, 555 F.2d 1182 (4th Cir. 1977), the issue has arisen as to the amount and type of evidence required. The Board has generally recognized that in the case of a *living* miner, the existence of a totally disabling pulmonary disease must be established through medical evidence. Lay testimony alone will not suffice. ***Krulcik v. Consolidation Coal Co.***, 5 BLR 1-533 (1982); ***Wozny v. Director, OWCP***, 2 BLR 1-141 (1979); ***Ward v. National Mines Corp.***, 2 BLR 1-92 (1979). Finally, the Board has held that where there is evidence tending to establish a totally disabling chronic respiratory or pulmonary impairment, and there is conflicting medical evidence as to the underlying cause(s), the claimant need not show that pneumoconiosis is the primary cause of the impairment prior to invocation of the Section 411(c)(4) presumption. ***Bain v. Old Ben Coal Co.***, 2 BLR 1-1219, 1-1223-24 (1981); ***Marshall v. Youghiogheny & Ohio Coal Co.***, 2 BLR 1-746, 1-753 (1979); ***Brown v. Eastern Associated Coal Corp.***, 2 BLR 1-450, 1-455 (1979). Rather, such a showing is to be considered on rebuttal. ***Skursha v. United States Steel Corp.***, 2 BLR 1-518 (1979).

The presumption can be rebutted by establishing that the miner does not, or did not, have pneumoconiosis, or that his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. 20 C.F.R. §§410.414(b)(2), 718.305(a). The "bursting bubble" theory of presumptions is inapplicable since the Act specifically assigns the methods to be used on rebuttal and the use of this theory would,

therefore, contravene Congressional intent. ***Legate v. Island Creek Coal Co.***, 1 BLR 1-898, 1-901 (1978). The opposing party may prevent invocation of Section 411(c)(4) by showing that the respiratory impairment in question is not totally disabling. ***Kozele v. Rochester and Pittsburgh Coal Co.***, 6 BLR 1-378 (1983); ***Gray v. U.S. Steel Corp.***, 1 BLR 1-237 (1977), *remanded sub nom*. ***U.S. Steel Corp. v. Gray***, 588 F.2d 1022, 1 BLR 2-168 (5th Cir. 1979).

Many cases appealed to the Board concern attempts at rebuttal through the use of evidence of a claimant's smoking habit to ascribe disability to that cause rather than coal mine employment. *See e.g.*, ***Martinez v. Director, OWCP***, 2 BLR 1-231 (1979); ***Rogers v. Ziegler Coal Co.***, 1 BLR 1-847 (1978). It is important to note, however, that many of the older cases have been overruled to the extent that they require the medical opinions to satisfy the reasonable degree of medical certainty standard expressed in ***Blevins v. Peabody Coal Co.***, 1 BLR 1-1023 (1978)(***Blevins II***). The Board has subsequently held that a doctor's opinion that is submitted as evidence to show that the claimant's impairment did not arise of coal mine employment is sufficient if it constitutes a reasoned medical judgment. ***Blevins v. Peabody Coal Co.***, 6 BLR 1-750 (1983)(***Blevins III***). For a discussion of the ***Blevins*** test for admissibility, *see* Part IV.D.3.a. of the Desk Book.

CASE LISTINGS

[adjudicator's refusal to invoke Section 411(c)(4) presumption affirmed where medical evidence accompanying lay testimony did not establish totally disabling respiratory impairment] ***Berus v. Director, OWCP***, 1 BLR 1-222 (1977); ***Webb v. Beth-Elkhorn Corp.***, 1 BLR 1-190 (1977); ***Yancy v. Director, OWCP***, 1 BLR 1-32 (1976).

[claimant's testimony, non-qualifying test results, and physician's "uncredited" report (*i.e.*, x-ray later re-read as negative) were not sufficient to establish totally disabling pulmonary impairment at Section 411(c)(4)] ***Miller v. Director, OWCP***, 2 BLR 1-447 (1979).

[critical demonstration for purposes of invocation at Section 411(c)(4) was that miner suffered breathing disability, not that disability could be traced to particular origin] ***Panco v. Jeddo-Highland Coal Co.***, 5 BLR 1-37 (1982).

[adjudicator's finding of no compensable lung impairment precludes Section 411(c)(4) entitlement] ***Norman v. Westmoreland Coal Co.***, 5 BLR 1-346 (1982).

[although lay testimony alone insufficient to support living miner claim under Section 411(c)(4), it must be weighed with medical evidence and evaluated by adjudicator when

determining entitlement pursuant to Section 411(c)(4)] ***Krulcik v. Consolidation Coal Co.***, 5 BLR 1-533 (1982); *see also* ***Ward v. National Mines Corp.***, 2 BLR 1-92 (1979); ***Spencer v. Winston Mining Co.***, 1 BLR 1-686 (1978).

[Eighth Circuit affirmed Board's finding that claimant not entitled to Section 411(c)(4) presumption as no showing of 15 years coal mine work; work in blacksmith's shop not coal mine work] ***Hon v. Director, OWCP***, 699 F.2d 441, 5 BLR 2-43 (8th Cir. 1983).

[error to consider on rebuttal evidence of miner's ability to perform usual coal mine work: not available under Section 411(c)(4); such evidence may preclude invocation] ***Kozele v. Rochester and Pittsburgh Coal Co.***, 6 BLR 1-378 (1983).

[Sixth Circuit reversed District Court's finding that Section 411(c)(4) presumption had been rebutted; negative x-rays and pulmonary function studies in and of themselves insufficient to rebut Section 411(c)(4) presumption] ***Collins v. Secretary of HHS***, 734 F.2d 1177, 6 BLR 2-54 (6th Cir. 1984); *see also* ***Haywood v. Secretary of HHS***, 699 F.2d 277, 5 BLR 2-30 (6th Cir. 1983); ***Caraway v. Califano***, 623 F.2d 7 (6th Cir. 1980).

[adjudicator's finding medical report unseasoned and therefore insufficient to invoke either Section 727.203(a)(4) or Section 411(c)(4) presumptions affirmed because physician failed to provide adequate rationale for diagnosis of pneumoconiosis] ***Goss v. Eastern Associated Coal Corp.***, 7 BLR 1-400 (1984).

[finding of Section 727.203(b)(3) or (b)(4) rebuttal would rebut Section 411(c)(4) presumption] ***Borgeson v. Kaiser Steel Corp.***, 7 BLR 1-655 (1985).

[adjudicator may consider other relevant evidence in addition to medical reports and, based on cumulative effect, find total disability established at Section 411(c)(4)] ***Burnett v. Director, OWCP***, 7 BLR 1-781 (1985).

DIGESTS

The Sixth Circuit, although agreeing with the Board that the evidence did not support invocation under 20 C.F.R. §727.203(a)(4), remanded for reconsideration of entitlement under Section 411(c)(4), although this method had not been considered by the administrative law judge. The Court held that unlike subsection (a)(4), the statute, which it considered "more liberal" enables claimants to establish the rebuttable presumption by introducing non-medical "other evidence." ***Freeman v. Director, OWCP***, 781 F.2d 79, 8 BLR 2-94 (6th Cir. 1986).